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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 OMARI NAEEM BEY,

8 Plaintiff(s),

9 v.

10 STATE OF NEVADA, et al.,

11 Defendant(s).

Case No. 2:19-CV-221 JCM (VCF)

ORDER

12
13 Presently before the court is defendant Quality Medical Imaging of Nevada LLC.'s
14 ("Quality") motion to dismiss. (ECF No. 23). Plaintiff Omari Naeem Bey ("plaintiff") filed a
15 response (ECF No. 26), to which Quality replied (ECF No. 29).

16 Also before the court is State of Nevada ex rel. Nevada Department of Corrections,
17 Director Greg Cox, Warden Dwight Neven, Correctional Officer Franco's ("state defendants")
18 motion to dismiss. (ECF No. 25). Plaintiff filed a response (ECF No. 30), to which state
19 defendants replied (ECF No. 31).

20 **I. Background**

21 As relevant here, on February 5, 2019, plaintiff brought this action, alleging (1) a
22 violation of his Eighth Amendment rights, (2) *Monell* liability, (3) sexual molestation as the tort
23 of assault, (4) sexual molestation as the tort of battery, (5) sexual molestation as the tort of
24 intentional infliction of emotional distress, (6) battery, during his incarceration at High Desert
25 State Prison.

26 After multiple attempts, plaintiff served Quality on May 7, 2019. Plaintiffs attempted to
27 serve state defendants through certified mail, which receipt was acknowledged on April 16,
28 2019. Plaintiff has not otherwise attempted service on state defendants. Now, both Quality and

1 state defendants move to dismiss plaintiff's complaint for failure to comply with Federal Rule of
2 Civil Procedure 4(m).

3 **II. Legal Standard**

4 Rule 4(m) provides the deadline for service as follows:

5 "If a defendant is not served within 90 days after the complaint is
6 filed, the court – on motion or on its own after notice to the
7 plaintiff–must dismiss the action without prejudice against that
8 defendant or order that service be made within a specified time.
But if the plaintiff shows good cause for the failure, the court must
extend the time for service for an appropriate period."

9 Federal Rule of Civil Procedure 12(b)(5) allows a party to file a motion to dismiss based
10 on a violation of 4(m). Courts have broad "discretion to extend time for service under Rule
11 4(m)," *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007), and may extend time for service
12 even after the Rule 4(m) deadline has expired, *Mann v. Am. Airlines*, 324 F.3d 1088, 1090 (9th
13 Cir. 2003). In addition, the Federal Rules of Civil Procedure "should be construed, administered,
14 and employed by the court and the parties to secure the just, speedy, and inexpensive
15 determination of every action and proceeding." Fed. R. Civ. P. 1.

16 **III. Discussion**

17 Pending before the court is Quality's and state defendant's motion to dismiss the
18 plaintiff's complaint for failure to comply with Rule 4(m). Quality asserts that the complaint
19 must be dismissed because the plaintiff missed his service deadline without good cause. State
20 defendants assert the complaint should be dismissed because plaintiff missed the service deadline
21 by serving the government through mail in violation of federal and Nevada rules. The court will
22 address each motion in turn.

23 **A. Quality's motion to dismiss**

24 Both parties agree that the Rule 4(m) deadline for plaintiff to properly serve Quality was
25 May 6, 2019. Both parties also agree that plaintiff missed this deadline by serving Quality on
26 May 7, 2019. Thus, the only question before the court is whether plaintiff missing this deadline
27 is excusable under the law.
28

1 The Ninth Circuit has explained that Rule 4(m) “provides two avenues for relief” for
2 parties who miss their service deadline. *Lemoge v. United States*, 587 F.3d 1188, 1198 (9th Cir.
3 2009). The first avenue is mandatory: upon a showing of good cause, a district court must
4 extend the time for service. *Id.* The second avenue is discretionary: if the plaintiff fails to
5 establish good cause, a district court may nevertheless extend the time for service so long as the
6 plaintiff demonstrates at least excusable neglect. *Id.*

7 As an initial matter, the court is not convinced regarding the plaintiff’s good cause
8 argument. The court must decide whether plaintiff’s failure to comply with the deadline was a
9 result of excusable neglect. Excusable neglect “encompass[es] situations in which the failure to
10 comply with a filing deadline is attributable to negligence” and includes “omissions caused by
11 carelessness.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 394, (1993). The
12 determination of whether neglect is excusable “is at bottom an equitable one, taking account of
13 all relevant circumstances surrounding the party's omission.” *Id.* at 395.

14 When making extension decisions under Rule 4(m) a district court may consider factors
15 “like a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and
16 eventual service.” *Efaw*, 473 F.3d at 1041 (quoting *Troxell v. Fedders of N. Am., Inc.*, 160 F.3d
17 381, 383 (7th Cir. 1998)).

18 Here, all four factors identified above weigh in favor of retroactive extension of time for
19 service. *See Uniloc 2017 LLC v. Box, Inc.*, No. 18-cv-07038-JST, 2019 WL 1571880, at *1
20 (N.D. Cal. 2019). Plaintiff argues the statute limitations period for these claims lapsed soon after
21 the complaint was filed, so any dismissal of this action would function as a dismissal with
22 prejudice ¹. Additionally, the court does not find allowing the plaintiff an extra day for
23 accomplishing service prejudices Quality. Quality failed to argue how this one-day period
24

25 _____
26 ¹ The court recognizes that plaintiff’s 42 U.S.C. § 1983 claims, assault and battery
27 claims, and intentional infliction of emotional distress claim are all subject to a two-year statute
28 of limitation. *See Nev. Rev. Stat. § 11.190(4)(e); Perez v. Seevers*, F.2d 425 (9th. Cir. 1989).
The underlying conduct occurred on April 27, 2017. Thus, two years would run on April 27,
2019. Plaintiff brought this action on February 5, 2019. Thus, if plaintiff’s claims were
dismissed, they would be time-barred.

1 impacted the case or prejudiced it. Lastly, plaintiff served defendant on May 7, 2019, which
2 gave defendant Quality actual—albeit late—notice of the lawsuit.

3 “The just, speedy and efficient disposition of plaintiffs’ claim on its merits is better
4 served by ignoring a day’s dilatoriness in accomplishing service than requiring plaintiffs to re-
5 commence their suit.” *Tyson v. City of Sunnyvale*, 159 F.R.D. 528 (N.D. Cal. 1995). *See* Fed. R.
6 Civ. P. 1. Thus, defendant Quality’s motion to dismiss is denied, and this court grants plaintiff a
7 retroactive, single-day extension of the service deadline to May 7, 2019, under 4(m), rather than
8 dismiss the action without prejudice.

9 **B. State defendants’ motion to dismiss**

10 The state defendants also move to dismiss for lack of service. State defendants argue
11 they have not been served for “nearly five months” and the court should dismiss under Federal
12 Rule Civil Procedure 12(b)(5). (ECF No. 25). It is uncontested that the plaintiff sent a copy of
13 the complaint and summons to the Nevada attorney general’s office in Carson City, Nevada by
14 certified mail. It was signed for on April 16, 2019. *Id.*

15 However, defendants contend that mailing a copy of the summons and complaint to the
16 Nevada attorney general’s office in Carson City is not sufficient to serve the state defendants in
17 this case. (ECF No. 31 at 3). The plaintiff disagrees and argues certified mail can be used to
18 effectuate proper service. (ECF No. 30 at 3). The court first turns to the question of whether the
19 plaintiff’s service method was sufficient under well-established law.

20 Both parties correctly identify that Federal Rule Civil Procedure 4(j)(2) governs this issue
21 and prescribes the method for serving a state or local government entity. Rule 4(j)(2) provides
22 two options for a state or state department to be properly served: “(A) delivering a copy of the
23 summons and of the complaint to its chief executive officer; or (B) serving a copy of each in the
24 manner prescribed by that state’s law for serving a summons or like process on such a
25 defendant.” *See* Fed. R. Civ. P. 4(j)(2).

26 Under subsection (A), service may be effected by serving the summons and complaint on
27 the current governor. *Hamer v. Nevada, Department of Employment, Rehabilitation and*
28 *Training, Vocational Rehabilitation Bureau*, No.: 2:15-cv-1036-GMN-GWF, 2018 WL 1567850,

1 at *2 (D. Nev. Mar. 30, 2018); *Uranga v. Adams*, No. 3:10-cv-00014-RCJ-RAM, 2011 WL
2 147909, at *4 (D. Nev. Jan. 14, 2011). Plaintiff failed to do so. Thus, Plaintiff did not properly
3 effect service under subsection (A) of Rule 4(j)(2).

4 Plaintiff's method of service for the state defendants also fails under 4(j)(2) subsection
5 (B). Subsection (B) allows the state to be served pursuant to the rules under that state's law.
6 Here, the court looks to Nevada law.

7 Under Nevada law, a plaintiff must serve both the attorney general and a person serving
8 in the office of the administrative head of the relevant state entity. NRS § 41.031(2)(a)–(b); *see*,
9 *e.g.*, *Hamer v. Nevada, Department of Employment, Rehabilitation and Training, Vocational*
10 *Rehabilitation Bureau*, No.: 2:15-cv-1036-GMN-GWF, 2018 WL 1567850, at *3 (D. Nev. Mar.
11 30, 2018); *Johnson v. Clark Cnty. Sch. Dist.*, No. 2:14-cv-02213-JAD-VCF, 2016 WL 3156059,
12 at *1 (D. Nev. June 3, 2016); *Mango v. DETR*, No. 2:10-cv-457-JCM-RJJ, 2011 WL 148280, at
13 *2 (D. Nev. Jan. 14, 2011).

14 Neither “dispatching the summons and complaint through email [n]or U.S. mail (even
15 certified mail) is sufficient to effectuate service of process under the Nevada or federal rules.”
16 *Johnson v. Clark Cnty. Sch. Dist.*, No. 2:14-cv-02213-JAD-VCF, 2016 WL 3156059, at *1 (D.
17 Nev. June 3, 2016); *see High Sierra Holistics, LLC v. Department of Taxation*, No. 3:19-CV-
18 00270-LRH-CBC, 2019 WL 3778068, at *1 (D. Nev. June 3, 2016).

19 Here, plaintiff's service fails for two reasons. He failed to serve a person in the office of
20 the administrative head of the relevant state entity or provide any proof of this action. NRS
21 § 41.031(2)(b). Plaintiff also attempted to serve the state defendants by certified mail which is
22 insufficient to effectuate service of process. Thus, plaintiff's method of service was insufficient.

23 Next, the court addresses whether the plaintiff should be granted additional time to
24 properly serve state defendants under 4(m). As discussed above, a district court may consider
25 factors ‘like a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and
26 eventual service.’ *Efaw*, 473 F.3d at 1041 (quoting *Troxell v. Fedders of N. Am., Inc.*, 160 F.3d
27 381, 383 (7th Cir. 1998)).

1 Based on the four factors discussed above, the court finds the plaintiff should be granted
2 more time to sufficiently serve state defendants. Admittedly, the plaintiff did not—and still has
3 not—properly served the state defendants. Nonetheless, the state defendants have not suffered
4 any prejudice because they received actual notice of this lawsuit. Conversely, plaintiff's claims
5 will be time barred if dismissed, which in effect, would serve as a dismissal with prejudice. The
6 court finds that it would be harsh and inequitable to dismiss plaintiff's claims without any
7 disposition of the merits, considering the gravity of the allegations.

8 State defendants' motion to dismiss is denied. Plaintiff is ordered to properly serve
9 defendants State of Nevada ex rel. Nevada Department of Corrections, Director Greg Cox,
10 Warden Dwight Neven, Correctional Officer Franco within thirty days of this order. Failure to
11 properly serve these defendants will result in dismissal upon a future 12(b)(5) motion.

12 **C. Conclusion**

13 Accordingly,

14 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Defendant Quality's
15 motion to dismiss (ECF No. 23) be, and the same hereby is, DENIED.

16 IT IS FURTHER ORDERED that state defendants' motion to dismiss (ECF No. 25) be,
17 and the same hereby is, DENIED.

18 IT IS FURTHER ORDERED that plaintiff serve state defendants within thirty days of
19 this order.

20 DATED September 30, 2019.

21 
UNITED STATES DISTRICT JUDGE